IN THE
SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1973

No. _____

RALPH GRIFFIN and ROBERT E. KEELE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION and LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed an order granting summary judgment in favor of respondents herein.

OPINION BELOW

The opinion of the Court of Appeals was rendered on April 25, 1973, No. 72-2117. The opinion is set forth in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254-1.

QUESTIONS PRESENTED

1. Whether it is constitutionally proper under the Fourteenth Amendment to the Constitution of the United States to prescribe the Statute of Limitations of the State of California to §1981 of Title 42 of the United States Code.

2. Whether an action under the 1964 Civil Rights Act requires filing with the Equal Employment Opportunities Commission if the events occurred more than ninety (90) days prior to the enactment of the act.

3. Whether a discriminatory act occurring in 1946 whose effects were not

apparent until 1969 would be barred by either laches or a statute of limitations.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Petitioners are longshoremen, and prior to retirement, were members of Local 13 ILWU, one of the respondents herein.

On September 13, 1971, petitioners filed suit in the United States District Court against PACIFIC MARITIME ASSOCIATION and LOCAL 13 of INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, for conspiracy under the Federal Civil Rights Act (Sections 1981 and 1982, Title XIV, USCA), for Declaratory Relief and for an injunction. Petitioners pray for declaration that the acts of respondents in de-registering them and in terminating them without notice, constituted an unlawful conspiracy, and that petitioners were unlawfully de-registered as members of Local 13; for a permanent injunction enjoining respondents from continuing their acts of de-registration and depriving them of their pension rights and automation pay and for compensatory and punitive damages.

On February 12, 1972, respondent Local 13 filed a Motion to Strike the Complaint and various allegations therein which ask for punitive damages and which asserted the Complaint as a class action, and further, for failure to comply with Rule 8(a) (2) of the Federal Rules of Civil Procedure.

On February 3, 1972, respondent PACIFIC MARITIME ASSOCIATION filed a Motion for Summary Judgment on the ground that the facts show that there is no theory on which petitioners can maintain this action. Subsequently, respondent Local 13 filed a similar Motion for Summary Judgment based substantially upon the same grounds as those asserted by respondent PACIFIC MARITIME ASSOCIATION.

The Motions were argued before the Honorable Jesse W. Curtis, District Judge, on March 27, 1972, and he granted the Defendants' Motion for Summary Judgment. Findings of Fact and Conclusions of Law were filed by the Court on April 6, 1972, and the Judgment was filed on the same date.

On May 4, 1972, petitioners filed a Notice of Appeal, appealing from the said Judgment which was entered on April 7, 1972.

B. STATEMENT OF FACTS

On April 16, 1946, respondent Local 13 terminated petitioners and others similarly situated who had been working as longshoremen and who were members of Local 13, all of whom were initiated on or after July 5, 1945. Petitioners thereafter refused the right to participate in any union affairs. Petitioners became members of Local 13 before April 16, 1946, and after July 5, 1945. They were fired without notice. There was no provision in the Union Constitution or By-Laws for correction of this Union act (Record on Appeal p. 81).

The Master Agreement then in effect between the Union and the Waterfront Employers Association of the Pacific Coast, Waterfront Employers Association of California, Waterfront Employers Association of Portland and the Waterfront Employers Association of Washington (all of whom were predecessors of respondent PACIFIC MARITIME ASSOCIATION) provided, inter lia, that preference of employment shall be given to Union members when available -- preference in making additions to the registration lists, and in dispatching men to jobs. The Agreement contained an anti-discrimination clause (Record on Appeal pp. 81-82).

Petitioners have claimed that their membership in Local 13 was terminated solely

because of their race, which was then a violation of the Master Agreement and since 1964 has been a violation of the Civil Rights Act; that their damages did not arise until they retired from employment, and that their cause of action under said Civil Rights Act arose under and by virtue of the Collective Bargaining Agreement of 1966-1971 between PACIFIC MARITIME ASSOCIATION and the INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, Local 13 (Record on Appeal p. 82).

In 1948 petitioner, RALPH GRIFFIN, filed suit against Local 13 in the Los Angeles Superior Court. A Fourth Amended Complaint was filed on May 8, 1950. He and twenty-seven other longshoremen claimed that they were fired because of their color and race. A Demurrer was sustained to the Fourth Amended Complaint, and on appeal the District Court of Appeals upheld the Demurrer because of laches and because it was barred by the California Statute of Limitations (Record on Appeal pp. 35-36).

On May 5, 1965, thirty-three men filed a grievance Petition with INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION - PACIFIC MARITIME ASSOCIATION Joint Labor Relations Committee. Petitioners Griffin and Keele did not sign said Petition and were not parties thereto (Record on Appeal p. 36).

The Petition raised issues similar to the Griffin 1948 lawsuit and on March 11, 1971, the arbitrator decided against the Petitioners, stating that plaintiff's claims were barred by the passage of time (Defendant's Exhibit 4 - Griffin deposition).

The respondents herein claim, by way of defense, that because of the foregoing events, petitioners cannot prevail on any theory, raising the defenses of Statute of Limitations, laches, collateral attack, estoppel, election of remedies and jurisdiction (Record on Appeal p. 25). Petitioners have consistently maintained that the actions of the respondents constituted a conspiracy to deprive them of their jobs because of their race and that Local 13 wished to maintain itself as a "lilywhite" union (Griffin Affidavit - Record on Appeal p. 90).

ARGUMENT

I

WHETHER IT IS CONSTITUTIONALLY PROPER UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PRESCRIBE THE STATUTE OF LIMITATIONS OF THE STATE OF CALIFORNIA TO §1981 OF TITLE 42 OF THE UNITED STATES CODE.

The Civil Rights Acts of 1866 and the Fourteenth Amendment to the Constitution of the United States following the said Act were enacted to protect former slaves from actions of States and persons acting under color of State law denegating their rights as free and equal citizens of the United States and of the State in which they dwell. Section 1981 of Title 42 of the United States Code codified the intent of Congress in the passage of legislation following long debate and analysis of the problems involving the newly freed slaves and emphasized that their rights and progress in establishing these rights may not be impeded by laws, statutes, ordinances, regulations or customs of the states. In the case of Jones v. Alfred H. Mayer Company, 392 U.S. 409, 88 Supreme Court 2186. To the Congress that passed the Civil Rights of 1866, it was clear that the right to do these things might

be infringed, not only by State and local law, but also by custom or prejudice. Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some three years after the ratification of the Fourteenth Amendment. It is quite true that some members of Congress supported the Fourteenth Amendment in order to eliminate doubt as to the Constitutional validity of the Civil Rights Act as applied to the states. But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent re-adoption of the Civil Rights Act were meant somehow to limit its application to State Action. The Federal Courts have analogized to State statutes of limitations in some cases where Congress was silent as to such limitation in enacting Federal statutes. It is clear, however, that a study of the history of Section 1981 of Title 42, United States Code, would indicate that the protections thereunder were meant to be broad and basic to the rights of the Negro citizen. In the case of Holmberg v. Armbrecht, 327 U.S. 392, 66 Supreme Court 582, the Court stated:

> "Traditionally and for good reasons Statutes of Limitations are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention. Namely, whether the plaintiff has inexcusably

> slept on his rights so as to make a decree against the defendant unfair."
>
> "It would be too incongruous to define a Federal right within the bare terms of a State statute of limitations."

Here, in effect, we have a fraudulent and unconstitutional act perpetrated upon the petitioners by respondents wherein they eliminated practically every Negro longshoreman from the union by the process of taking away their membership books in 1946. Although some years later many, or most, of them were again able to obtain books, this was too late to defend the rights that they would and should have had had their membership books not been unconstitutionally taken from them, as, under the 1966-1971 collective bargaining agreement, they would have obtained approximately $13,000.00 automation pay, in addition to a higher pension, had the membership time dated back to the 1946 period. Therefore, the true effect of the fraud upon them was not known until the effect of the 1966-1971 contract was fully realized.

II

WHETHER AN ACTION UNDER THE 1964 CIVIL RIGHTS ACT REQUIRES FILING WITH THE EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION IF THE EVENTS OCCURRED MORE THAN NINETY (90) DAYS PRIOR TO THE ENACTMENT OF THE ACT.

It is true that no complaint was filed with the EEOC as required by 42 U.S.C. Section 2000e-5(e), and while it is true that the alleged discriminatory act first took place in 1946 and is a continuing act, petitioners' damages became a reality and became fixed under and by virtue of the 1966-1971 contract. Petitioners sought relief initially after the 1948 Superior Court litigation by way of arbitration and during this period sought no relief under the 1964 Civil Rights Act. While attempting to exhaust administrative remedies, the 90-day period within which to file with the EEOC expired. To file would have been a futile act. Petitioners were caught in a legal dilemma -- if they filed with EEOC, they would have been faced, in all likelihood, with a defense at law of not having resorted to administrative relief, and by pursuing administrative relief the 90 day period expires. It is petitioners' contention that the right to earn a livelihood is a property right guaranteed by the Constitution of the State of California which cannot be taken away by legislative action.

Love v. Pullman,
404 U.S. 522, 92 Supreme Court 616;

Declaration of Rights, State of California, Article 1, Section 1;

Executive Order No. 9346 (Franklin D. Roosevelt) May 27, 1943.

Here the respondents had ample notice of the Complaints of petitioners and therefore were not prejudiced by the failure to file. The same claim of the respondents would have been entered that the act originated in 1946, at which time the EEOC did not exist.

III

WHETHER A DISCRIMINATORY ACT OCCURRING IN 1946 WHOSE EFFECTS WERE NOT APPARENT UNTIL 1969 WOULD BE BARRED BY EITHER LACHES OR A STATUTE OF LIMITATIONS.

Respondents rely upon the defense of the California Statute of Limitations. In this they are supported in the opinion of the Court of Appeals for the Ninth Circuit. They claim that the cause of action in this Complaint arose back in 1946 when petitioners were de-registered (Record on Appeal pp. 18-24). While it is true that the act of de-registration occurred in

1946, petitioners' actions are fastened on the 1966-1971 contract and in this respect assert that they have a right to rely upon the principle of equitable estoppel, i.e., that respondents should not be permitted to plead the Statute of Limitations because petitioners' rights to vacation pay, seniority and automation pay and their retirement thereto were ascertainable only after 20-25 years continuous service in the industry put in by them. It is only at that time that any man knows how much seniority he has. Respondent PACIFIC MARITIME ASSOCIATION'S actions and assertions, in failing to give the petitioners credit for the 1946-1949 layoffs, are now asserting a right fixed under the 1966-1971 contract (petitioners' Exhibit "A" -- Record on Appeal p. 88). Estoppel essentially is a right arising from an act, admission or conduct which has induced a change of position in accordance with a real or apparent intention of the party against whom the estoppel is asserted, 18 Cal. Jur. 2d p. 413.

California Evidence Code, Section 663, provides that whenever a party has, by his own statement or conduct, intentionally and deliberately lead another to believe a particular thing is true and to act upon such believ, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

Respondents, due to their wrongful acts in failing to grant petitioners full seniority rights dating back to the pre-1946 period, have

caused a series of events to flow from their wrongful actions, ultimately resulting in the diminished pensions and automation pay, the effect of which was not, of course, ascertainable until the 1966-1971 contracts. They should be estopped from taking advantage of the Statute of Limitations which in any event is not provided for in Section 1981 and the history of the statute indicates that Congress did not intend there to be any limitation upon the rights of former slaves or their descendants to take full advantage of the new freedoms contained therein.

CONCLUSION

For the reasons urged above, petitioners pray that a Writ of Certiorari should be issued to review the decision below.

Respectfully submitted,

SELWYN, CAPALBO & MORSE

By: Herbert E. Selwyn

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RALPH GRIFFIN and ROBERT E. KEELE,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION and LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
Appellees.

No. 72-2117
OPINION

[April 25, 1973]

Appeal from the United States District Court
for the Central District of California

Before: MERRILL, ELY, and WRIGHT, Circuit Judges.

PER CURIAM:

A group of longshoremen appeal from an order granting summary judgment in favor of their union and certain employers.

The longshoremen complain that in 1946, they were "deregistered" by the union and prevented from pursuing their trade until, several years later, they were allowed to reregister. They alleged that the 1946 layoff was racially motivated and contend that the blacks and Mexican-Americans who were deregistered are entitled to receive credit (towards seniority and vacation, automation and pension pay) for the periods during which they did not work, 1946 to 1948-51.

On multiple grounds the District Court held that it was not required to reach the merits of the claim. We agree with the District Court that the action was barred by reason of the passage of time and the appellants' failure to exhaust another remedy. We make no judgment on the merits of the claim. Nor do we

announce an opinion as to the correctness of the other grounds upon which the District Court rested its decisions.

The longshoremen alleged jurisdiction by reason of both the 1866 Civil Rights Act (42 U.S.C. §§ 1981, 1985) and the 1964 Civil Rights Act (42 U.S.C. § 2000-e).

The 1866 Act

The pertinent provisions of the 1866 Civil Rights Act prescribe no period of limitations; hence, the most nearly analogous state period of limitations applies. *See, e.g., United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757, 763 (3d Cir. 1971).

The most nearly applicable California statutes prescribe limitation periods not exceeding four years. *See* Cal. Code Civ. Pro. §§ 337, 338(1) (West 1972 Supp.) & 343 (West 1954). If any one of these statutes governs the longshoremen's § 1981 and § 1985 actions, the filing of the complaint was decidedly tardy.

The longshoremen advance two reasons why the statute of limitations should not be held to have commenced to run from 1946 or thereabouts.[1] First, they argue that the pension and fringe benefits were not fully ascertainable until sometime later, and they contend that their cause of action resides in their 1966-71 contract. We recognize that there may be cases in which a legal wrong has no significantly compensable consequences until the occurrence of a subsequent event. But we need not now decide whether, in such instances, the period of limitations should be considered to commence from the date of that event. Here, the perceivable effects of the alleged wrong were substantial at the outset. In 1948, one of the appellants in this case instituted suit in the California courts, seeking to regain union membership and employment. That suit presented the precise central issue that is now presented here and was decided adversely to the appellant Griffin. *Griffin v. International Longshoremen's and Warehousemen's Union*, 109 Cal. App. 2d 823 (1952). And, in 1965, 33 long-

[1]The suggestion that appellees were estopped from asserting the statute of limitations as a defense has no merit whatsoever.

shoremen filed a grievance based on their 1946 deregistration and unsuccessfully resorted to arbitration.

Second, the appealing longshoremen contend that by refusing to credit them with the years lost after 1946, appellees are now committing a discriminatory act. We are not unmindful of certain cases wherein the theory of continuing discrimination has been upheld. *See, e.g., Love v. Pullman Co.*, 404 U.S. 522, 524 n.3 (1972); *Cox v. United States Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969). A layoff, by itself, however, is not such a continuing act. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1211 (1971). Furthermore, in the present case, the only manner in which the appellants could have possibly established their claim was by evidence as to what motivated the 1946 act of deregistration and the subsequent, although short-lived, refusal to allow reregistration.[2] In these circumstances, the District Court properly held that the claims under 42 U.S.C. §§ 1981 and 1985 were barred by reason of the lengthy lapse of time.

The 1964 Act

Unlike the 1866 Act, Title VII of the 1964 Civil Rights Act contains provisions that effectively operate to create a limitations period. An aggrieved party may sue in the District Court only if he has first filed charges with the Equal Employment Opportunity Commission (EEOC) within 90 days from the occurrence of the alleged violation, and the suit must be filed within thirty days from receipt of a notice of failure of conciliation from the EEOC. 42 U.S.C. § 2000e-5(a)&(d).

When a state has prohibited the unlawful practice alleged and has provided an agency "to grant or seek relief," additional administrative recourse is a prerequisite to private suit. The state

[2]On the face of it, denial of fringe benefits under the 1966-71 contract is a racially neutral act. At least half of the longshoremen deregistered in 1946 were Caucasian, and all had lower seniority than those not deregistered. There is no claim that the deregistered men have been the victims of discrimination since their reregistration, except inasmuch as they lost credit for their years outside the union.

agency must be notified, and the charge with the EEOC must be filed no later than thirty days after the state investigation is completed.[3] 42 U.S.C. § 2000e-5(b)&(d). *See Love v. Pullman, supra.*

California has established the remedies contemplated in § 2000e-5(b). *See* California Fair Employment Practice Act, Cal. Labor Code §§ 1410 et seq. (West 1971).

The appellants have never filed charges with the state agency or with the federal commission. They explain their failure to have done so on the theory that exhaustion of these remedies would have been futile because these agencies would merely have required them to seek arbitration. In advancing this argument, the appellants misconceive the role of the EEOC.[4] Moreover, even after their unsuccessful recourse to arbitration, the longshoremen did not pursue the administrative remedies specified in Title VII.[5] Having failed to comply with the requirements of 42 U.S.C. § 2000e-5(a)&(b), the appellants may not, at this late date, maintain action under the Civil Rights Act of 1964.

AFFIRMED.

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[3]Title VII does not specify how long a person may delay the filing of charges with the state agency. In California, one is allowed a period of one year from the occurrence of the allegedly unlawful act within which to file his claim with the state commission. Cal. Labor Code § 1422 (West 1971).

[4]There is no jurisdictional bar to invoking Title VII remedies and the arbitration process independently. *See Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971); *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 311-14 (5th Cir. 1970); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 714-15 (7th Cir. 1969). *But see Alexander v. Gardner-Denver Co.*, 466 F.2d 1209 (10th Cir. 1972). And our court has held that there is no requirement that *all* conceivable state remedies be exhausted prior to the institution of a Title VII suit. *Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F.2d 1028, 1031 (9th Cir. 1970).

[5]*Cf. Culpepper v. Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970).

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 4-27-73—480